

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010)	CG Docket No. 10-213
)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996)	WT Docket No. 96-198
)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf- Blind, or Have Low Vision)	CG Docket No. 10-145
)	

REPLY COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

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CTIA-The Wireless Association® (“CTIA”)^{1/} submits these reply comments in response to the Notice of Proposed Rulemaking (“NPRM”) issued by the Federal Communications Commission (“Commission” or “FCC”) seeking comment on the rules that will implement the advanced communications provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the “Act”).^{2/} The initial comments confirm that the Commission can best further the goals of the Act by ensuring that its final rules provide clear guidance to

^{1/} CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization includes Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

^{2/} *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket No. 10-213, *et al.*, Notice of Proposed Rulemaking, FCC 11-37 (rel. Mar. 3, 2011) (“NPRM”); *Twenty-First Century Communications and Video Accessibility Act of 2010*, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.).

providers and manufacturers of devices that offer advanced communications services, ensure flexibility in order to promote innovative solutions for people with disabilities to access and use such services, and recognize that such obligations will take time to implement. In particular, CTIA believes that the final rules must:

- reflect the Act as written and the Commission should refrain from any “interpretation” of the Act – including its limitations on liability, its limitations on which products and services must be made accessible, its provision grandfathering services and equipment covered by section 255, and its governing definitions – beyond its express and inherent bounds;
- include a carefully tailored definition of advanced communications services (“ACS”) and a reasonable waiver process to ensure that the Act applies only to services and devices with ACS as their primary purpose;
- establish a balanced approach that allows service providers and manufacturers flexibility in how to achieve accessibility in covered products and services;
- rely on a streamlined informal complaint process that expeditiously addresses cognizable claims; and
- adheres to the Act’s recordkeeping obligations.

INTRODUCTION AND SUMMARY

As CTIA highlighted in our initial comments, the record confirms a widespread industry commitment to ensuring the accessibility of products and services for persons with disabilities and a great deal of wireless innovation already occurring that supports the goals of the Act.^{3/} All

^{3/} See, e.g., Comments of T-Mobile USA, Inc., CG Docket No. 10-213, at 3-4, n. 9 (April 25, 2011) (“T-Mobile Comments”); Comments of AT&T, CG Docket No. 10-213, at 1-2 (April 25, 2011) (“AT&T Comments”); Comments of Microsoft Corporation, CG Docket No. 10-213, at 2 (April 25, 2011) (“Microsoft Comments”); Comments of Consumer Electronics Association, CG Docket No. 10-213, at 2, n. 6 (April 25, 2011) (“CEA Comments”); Comments of Voice on the Net Coalition, CG Docket No. 10-

of this innovation and progress occurred with the certainty provided by a balanced, flexible regulatory framework and the voluntary commitment of the wireless industry to offer products and services that meet the different needs of each consumer, including persons with disabilities.

To implement the Act's obligations in a manner that reflects Congressional intent, yet promotes accountability as well as innovation, the Commission's regulatory scheme should reflect the following:

First, the final rules must acknowledge the limits that Congress placed on industry obligations for accessibility. Many of the comments ask the Commission to ignore these limits and eviscerate the balance that Congress established. While CTIA agrees that the rules should further the purpose of the Act to promote the availability and usability of ACS to persons with disabilities, the Commission must implement the Act as written and refrain from interpreting the Act beyond its express and inherent bounds. Specifically, the Act's definitions, its provisions limiting third party liability, its direction that not every product and service must be accessible to every disability, and its provision grandfathering services and equipment covered by section 255 are controlling. Comments seeking to reject or limit these balancing provisions must be dismissed.

Second, the Commission should carefully tailor the definition of ACS to include only services and devices that offer ACS as their primary purpose. To provide the greatest degree of clarity and certainty, the Commission should dismiss its early inclination to adopt a wide-scale waiver approach and instead craft final rules that limit the services and devices that must comply with accessibility obligations.

213, at 2 (April 25, 2011) ("VON Coalition Comments"); Comments of CTIA-The Wireless Association, CG Docket No. 10-213 at 3-6 (April 25, 2011)("CTIA Comments").

Third, the Commission’s rules must reflect the flexibility that Congress intended the Act to provide. The initial comments reflect a general belief and concern that if the Commission tries to dictate how accessibility obligations must be achieved without allowing for flexibility and creativity, the result will not meet Congress’ intent to ensure that wireless continues to be a beacon of innovation that improves the lives of all consumers, including the accessibility community.^{4/} The Commission can best achieve accessibility by creating rules that encourage the development and deployment of a wide variety of products and services to meet the goals of the Act. Specifically, the Commission should ensure that its “achievable” test adheres to the “reasonable” basis and the four inquiries provided by the Act. The Commission should also consider other important regulatory goals such as reasonable network management, privacy, and security in creating and implementing its final rules.

Fourth, in implementing the Act, it is critical that the Commission understand and account for the product development cycle and other policy goals. Products already in development are simply too far into the design and manufacturing process to be redesigned to meet the Commission’s proposed requirements. Consistent with related accessibility orders, the Commission’s compliance deadlines must also account for this reality by providing a minimum of 24-36 months between publication of the final rules and their effective date.^{5/} In this way, the

^{4/} See, e.g., T-Mobile Comments at 2 (“[P]roviding industry with flexibility to comply with these sections is also consistent with the CVAA and will help promote innovation and the growth and deployment of mobile broadband services for all Americans, another important policy goal.”); AT&T Comments at 2 (“[T]he Commission should take care to preserve sufficient flexibility to support continued innovation. An overly broad regulatory obligation could prevent new products from being brought to market, out of concerns regarding compliance costs.”).

^{5/} See 47 C.F.R. 20.19 (c)-(d) (providing a “phase-in” for public mobile service handsets concerning radio frequency interference and inductive coupling).

Commission can best ensure that all providers in the wireless ecosystem are adequately prepared to comply with the Act's obligations.^{6/}

Finally, the Commission should ensure that its informal complaint process expeditiously addresses cognizable claims and refrain from adopting any recordkeeping obligations that fall outside of the Act's requirements.

I. THE SCOPE OF COMPLIANCE RESPONSIBILITY MUST ADHERE TO THE FRAMEWORK ESTABLISHED UNDER THE ACT

A. The Rules Must Conform To The Act's Limited Liability Provisions.

As CTIA emphasized in its initial comments, the Commission's final rules must limit the scope of compliance to the entities that are responsible for the ACS product or service and must clearly delineate the point at which covered entities are responsible for compliance.^{7/} Many commenters agree that in order to promote innovation and provide accessibility options to a wider range of consumers, entities must have a clear indication about the scope of their liability for accessibility features.^{8/}

Other commenters, however, encourage the Commission to circumvent the clear limits established by Congress that ensure covered entities are not responsible for the compliance of third party products and services except in narrowly defined circumstances. The Commission

^{6/} See, e.g., Comments of Verizon and Verizon Wireless, CG Docket No. 10-213, at 2-3 (April 25, 2011) ("Verizon/Verizon Wireless Comments"); Comments of Motorola Solutions, Inc., CG Docket No. 10-213, at 15-16 (April 25, 2011) ("Motorola Comments").

^{7/} CTIA Comments at 11 ("Clear limitations on liability will ensure that all participants understand their role in making a product or service accessible and are comfortable that they will not be held responsible for failures that they have no role in preventing.").

^{8/} See, e.g., VON Coalition Comments at 8 ("It is important that each industry participant knows its obligations for products and services subject to the rules the Commission adopts in the instant proceeding."); T-Mobile Comments at 5 ("It is important that the Commission draw a bright line between 'providers of ACS' and 'manufacturers' in its regulations to provide regulatory certainty and avoid unduly burdening industry participants.").

should reject such calls. In particular, as directed by the Act, the Commission should not extend covered entities' liability for the compliance of third party applications and software beyond the situations designated by Congress, and should reject any interpretation of the rules which would broaden the Act's liability to the owners of network facilities.

The Act clearly provides that covered entities are not responsible for the compliance of third party products and services unless the manufacturer relies upon the third party device to comply with the Act's requirements. Despite this explicit boundary, the Consumer Groups propose that manufacturers be held responsible for the accessibility of any software that is "availabl[e] to download" to the manufacturer's device, whether or not installed by the manufacturer.^{9/} Similarly, TRACE broadly contends that "in some circumstances a manufacturer should be held responsible for third party applications and add-ones because of the interconnected nature of many devices/services and their third party components,"^{10/} and then defines those circumstances expansively to include any third party application that is bundled or sold with the device, any application that a manufacturer is found to have "prefer[red]" or "incentivize[d]" and any application that is marketed with a device or service.^{11/} Indeed, only when a manufacturer "has nothing to do with the purchase or installation of the 3rd party application" would TRACE find the manufacturer or provider not responsible for the accessibility of that application.^{12/} Such a narrow exemption would virtually guarantee that

^{9/} Comments of the Telecommunications for the Deaf and Hard of Hearing, Inc., *et al.* ("Consumer Groups Comments"), CG Docket No. 10-213, at 4 (April 25, 2011).

^{10/} Comments of the Rehabilitation Engineering Research Centers on Universal Interface & Information Technology Access (RERC-IT) and Telecommunications Access (RERC-TA), CG Docket No. 10-213, at 3 (April 25, 2011) ("TRACE Comments").

^{11/} *Id.* at 6.

^{12/} *Id.* at 3.

almost all manufacturers and providers would be held responsible for unaffiliated third party applications, whether or not they rely on those applications for their compliance with the Act. These interpretations are flatly prohibited by the Act, precluding the Commission from adopting them.^{13/}

Moreover, any interpretation that effectively limits the scope of Section 2 of the Act would work against the Commission's vision of an innovative broadband ecosystem. Creative, open and customized solutions can provide highly individualized access for persons with disabilities only if providers and manufacturers have the certainty that such solutions will not result in unexpected liability.^{14/} Accordingly, CTIA agrees with TIA that "consistent with Congressional intent and the statutory language, the Commission should clarify that equipment manufacturers are responsible only for meeting the Act's accessibility requirements with respect to the product's hardware and ACS applications that the manufacturer intentionally installs on the device before sale"^{15/} unless the manufacturer relies on third party software or hardware to comply with its accessibility obligations.

^{13/} See CTIA Comments at 9-10; TIA Comments at 7-8; Verizon/Verizon Wireless Comments at 3-4.

^{14/} See Verizon/Verizon Wireless Comments at 3-4 ("In today's mobile environment, with open platforms and Application Programming Interfaces (APIs), carriers have only limited control and knowledge over what their customers download to their devices. The CVAA reflects the fact that, in those circumstances, the software developers or application providers offering the product, not the underlying carriers, are best equipped to ensure an application's accessibility. Carriers are therefore not liable for third party applications that their customers may download onto their mobile devices, and it would be contrary to the CVAA to hold carriers responsible for compliance with respect to applications over which they have only limited control.").

^{15/} TIA Comments at 7-8; *see also* AT&T Comments at 8 ("In implementing Section 716, the responsibilities that the Commission imposes on service providers and manufacturers should pertain only to the services and applications those service providers and manufacturers provide to consumers and not to third party software and equipment.").

Similarly, the Act precludes any interpretation that would broaden compliance liability to the owners of network facilities.^{16/} The Consumer Groups and TRACE inexplicably argue that “[a]ll elements . . . [of] the ACS value chain,”^{17/} should be considered providers of an ACS service and liable for its accessibility, including providers that “possess the underlying network facilities” over which advanced communications service may be accessed.^{18/} Practically, this interpretation fails to consider the increasing reality of open products and services in which it may be unclear to the end user who is the covered entity for one device or service that is capable of providing ACS over a variety of network facilities. In any event, the suggested interpretation is expressly contradicted by the language of Section 2 of the Act,^{19/} and must be rejected.^{20/}

B. The Final Rules Must Recognize The Act’s Express And Inherent Definitional Bounds.

The Commission’s final rules must adhere to the plain language of definitions set forth in the Act and Congressional intent. The Commission has no authority to expand the reach of the Act by manipulating the plain language of its definitions.

^{16/} See Act § 2(a); H. Rep. No. 111–563, at 22 (2010) (“House Report”) (the Act provides “liability protection where an entity is acting as a passive conduit of communications made available through the provision of advanced communications services by a third party or where an entity is providing an information location tool through which an end user obtains access to services and information”).

^{17/} TRACE Comments at 11.

^{18/} Consumer Groups Comments at 5.

^{19/} Act § 2(a) (“no person shall be liable for a violation of the requirements of [the CVAA] with respect to . . . advanced communications services, or equipment used to provide or access advanced communications services to the extent such person - transmits, routes, or stores in intermediate or transient storage the communications made available through the provision of [ACS] services by a third party”).

^{20/} CTIA Comments at 8-9.

1. The definitions cannot be interpreted to extend beyond the covered service or equipment to tangential products and services.

Several parties argue that in order for a service or equipment to be truly accessible, the Commission should “interpret” the definition to encompass other services, equipment, or features as well. The Commission cannot, under the guise of “interpreting” the meaning of a defined ACS product or service, expand the Act’s coverage to tangential products and services, whether or not such expansion would promote additional accessibility. Indeed, if the potential for contributing to improved accessibility were the standard for what is covered by the Act, there would be no need for Congress to have established definitional boundaries limiting coverage to specific products and services. An “interpretation” that would result in limitless coverage is not a legal one.

The Commission must reject calls to broaden the covered products and services beyond those Congress chose to include. Arguments to apply accessibility obligations to any device that “potentially can connect to the [Public Switched Telephone Network (PSTN)]”^{21/} would create an ambiguous standard that could potentially (and unknowingly) apply to newly-developed products and applications that cannot currently (nor are designed) to access the PSTN. Likewise, arguments that equipment “used for advanced communications services” should include “any and all equipment” that may be implicated in the provision of ACS, whether or not the equipment is capable of offering ACS, must be rejected.^{22/}

TRACE’s suggestion that the Commission adopt new definitions of both interconnected

^{21/} Comments of the Administrative Council for Terminal Attachments, CG Docket No. 10-213, at 5 (April 13, 2011) (“ACTA Comments”).

^{22/} Consumer Groups Comments at 4; ACTA Comments at 5.

and noninterconnected VoIP is similarly unsupportable.^{23/} Abandoning statutorily-created definitions in favor of new, broader definitions is inconsistent with the plain language of the Act and would be an impermissible exercise of administrative authority.^{24/} Moreover, any revision of the definitions would likely cause further confusion about such services and whether they are subject to the Act.

2. “Electronic messaging service” cannot be defined to include the platform over which services are delivered.

Contrary to the contentions of some commenters, the term “electronic messaging service” (“EMS”) does not include services and applications that merely provide access to an EMS (*e.g.*, the broadband platform that gives the end user access to an HTML-based email service). While some commenters suggest that “such an assertion could exempt Internet Service Providers (“ISPs”) from Section 716 obligations for advanced communications services,”^{25/} and others note a concern that e-mail services are likely to be web-based in the future, resulting in a gap in coverage,^{26/} a disagreement with Congress’ decision to exempt ISPs from accessibility obligations when they are acting only as a conduit does not entitle the Commission to revise the EMS definition to achieve a result opposite from what Congress intended.^{27/} Moreover, as

^{23/} TRACE Comments at 8 (urging the Commission to broaden the definition of interconnected VoIP to apply to calls that terminate on the PSTN “*or its successors.*”) (emphasis added); *Id.* at 9 (urging the Commission to impermissibly amend the definition of noninterconnected VoIP to “any VoIP that is not interconnected VoIP.”).

^{24/} *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004); *Alabama Power Co. v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979) (an agency must interpret a statute according to its plain language, and may not add language that Congress has not included).

^{25/} Consumer Groups Comments at 6.

^{26/} TRACE Comments at 11.

^{27/} *See* CEA Comments at 14 (The “CVAA does not permit the Commission to define as EMS those services or applications that merely provide access to EMS, such as a broadband platform or a browser.... End users do not perceive these devices as providing them with EMS capability. The Commission should clarify that mere access to the Internet via a browser on a device does not necessarily mean that the device

TRACE notes,^{28/} the definition of EMS is meant to cover only services that may provide direct person-to-person communications, rather than “publication” or “one-to-many” services.^{29/} Any comments that suggest the inclusion of machine-to-machine communications must be rejected.

3. Interoperable video conferencing service (“IVCS”) must be defined to include only services that are both “interoperable” and “video conferencing services.”

The Commission should define “interoperable video conferencing” within the confines of the plain language of the Act and the intent of Congress and should reject any alternative interpretations. In particular, the final rules cannot support Consumer Groups’ assertion that anything “capable of” video conferencing is covered even if that is not what the service is designed and marketed to do,^{30/} nor TRACE’s suggestion that the term “include[s] the broadest range possible because none of the listed services is likely to exist in its current form in 20 years.”^{31/} Neither interpretation has any support in the legislative language and should be summarily dismissed. The Commission must implement the Act as it is actually written.

offers EMS.”); TIA Comments at 10 (“[S]ervices and applications that provide access to electronic messaging services, like a broadband platform that provides access to an HTML-based email service, are [] not covered by the Act.”); Verizon/Verizon Wireless Comments at 7-8 (“[T]he CVAA does not permit the Commission to define as EMS those services or applications that merely provide access to EMS.”).

^{28/} TRACE Comments at 10.

^{29/} *See, e.g.*, CEA Comments at 13-14 (“By definition, EMS should also not include the following forms of communication: device-to-device (‘D2D’), machine-to-machine (‘M2M’), human-to-machine, automatic software updates, or any other communication that does not involve communications ‘between individuals.’”); TIA Comments at 10 (“[T]he phrase ‘between individuals’ in the definition excludes communications in which no human is involved, like automatic software updates or other device-to-device or machine-to-machine communications.”); Verizon and Verizon Wireless Comments at 7 (“[T]he phrase ‘between individuals’ precludes the application of the accessibility requirement to communication in which is involved, such as automatic software updates or other device-to-device or machine-to-machine communications.....”).

^{30/} Consumer Groups Comments at 8.

^{31/} TRACE Comments at 11.

Moreover, the term cannot be read to impose an interoperability requirement. The strained argument that interoperability should be considered as a requirement because the compatibility that is required when accessibility cannot be achieved would require interoperability, and the accessibility requirement “presumably subsume[s] lesser obligations”^{32/} is wholly unsupported by the Act’s language or legislative history and would logically lead to an endless and unspecified realm of obligations. TRACE further argues that interoperability is important and should be required,^{33/} but this argument, too, finds no support in the statute. Even if true, a need for something does not render it legally required.

The only way to read the term to harmonize with the plain language of the statute and the rules of statutory construction is that “interoperable” is a qualifying adjective, describing and so limiting the video conferencing services that are covered.^{34/} This interpretation is the only possible interpretation to avoid rendering the term “a meaningless modifier.”^{35/}

4. The final rules must exempt customized services and equipment.

CTIA firmly agrees that the Act’s exception for customized services and equipment

^{32/} Consumer Groups Comments at 9.

^{33/} TRACE Comments at 14.

^{34/} See, e.g., VON Coalition Comments at 5-6 (asserting that the word “‘interoperable’ limits the scope of video conferencing services covered by the CVAA and should be defined, as it is commonly understood to mean, as a system that is able to work with or use the equipment of another system.”); CEA Comments at 14 (“Congress explicitly and intentionally added ‘interoperable’ to narrow the scope of video conferencing services covered by the CVAA. Thus, the Commission should interpret ‘interoperable’ in a reasonable manner – *i.e.*, by applying the Section 716 accessibility obligations to only those video conferencing services that can operate between and among different platforms, networks, and providers.”); TIA Comments at 10 (“The Commission should assume that Congress did not intend for it to adopt an entirely different and more expansive definition for purposes of the CVAA. Thus, as part of the definition, the term “interoperable” is not meant to require interoperability, but instead, to narrow the scope of services covered by the definition.”).

^{35/} VON Coalition Comments at 6.

should not allow covered entities to create “sham customizations”^{36/} in an attempt to evade the rules. However, the Commission cannot and does not have the authority to limit the exception in the ways that have been proposed.^{37/} Proposals that would limit the exception to customizations with a “significant change in the functionality of the product or service,”^{38/} or exclude any “routine” customizations,^{39/} would contradict the statutory language and prohibitively narrow the exception which by its own terms applies to all “customized equipment or services that are not offered directly to the public . . . regardless of the facilities used.”^{40/} Further, the Commission cannot subject customized services and equipment to the rules if they would be exempt but for their primary purpose,^{41/} particularly services and equipment that are more appropriately addressed by the Americans with Disabilities Act (*i.e.*, services and equipment customized for employment, education or other public purposes).^{42/}

C. The Final Rules Must Acknowledge That Not Every Product And Service Must Be Accessible For Every Disability.

The Commission must dismiss any comments that presume that all products and services that may meet the proposed definitions of “advanced communications services” are subject to the accessibility requirements unless “not achievable.” The Act clearly provides – separate and apart from the question of whether accessibility is “achievable” – that not every product and service

^{36/} Consumer Groups Comments at 12.

^{37/} CTIA Comments at 23.

^{38/} Consumer Groups Comments at 12; TRACE Comments at 15.

^{39/} TRACE Comments at 15.

^{40/} 47 U.S.C. § 617(i).

^{41/} *See, e.g.*, T-Mobile Comments at 8; Motorola Comments at 3.

^{42/} Motorola Comments at 3-4.

must be accessible, giving manufacturers and providers much needed flexibility to determine which of their products and services can and should be made accessible.

The Consumer Groups argue that manufacturers and service providers should not be able to justify having products and services that are not accessible “merely by showing” that it offers other products that are accessible.^{43/} Similarly, the American Foundation for the Blind inaccurately asserts that “[c]overed industry is only relieved of [compliance with Section 716] when compliance is not achievable.”^{44/} These comments fail to address how such proposals square with the rule of construction set forth in Section 716(j), however, which explicitly states that the section “shall not be construed to require a manufacturer of equipment used for advanced communications or a provider of advanced communications services to make every feature and function of every device or service accessible for every disability.”^{45/} Indeed, such proposals would render section 716(j) meaningless, and as such, cannot be the correct interpretation.^{46/}

D. The Final Rules Must Provide That Equipment And Services That Were Subject To Section 255 Before Enactment Remain Subject To Section 255.

The Commission must recognize the express language of the Act that limits the application of section 716 to devices and services that are not subject to section 255.^{47/} This explicit limitation includes interconnected VoIP service and multipurpose devices.^{48/} As the American Foundation for the Blind acknowledges, the provision was negotiated between

^{43/} Consumer Groups Comments at 18.

^{44/} Comments of the American Foundation for the Blind, CG Docket No. 10-213, at 3 (April 25, 2011) (“AFB Comments”).

^{45/} 47 U.S.C. § 617(j).

^{46/} CTIA Comments at 12-13.

^{47/} 47 U.S.C. § 617(f).

^{48/} *Id.* (“[T]he requirements of this section shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 . . .”).

industry and advocates for the disabled, who agreed that “it would not be fair to apply a brand new set of legal expectations to old technology which . . . has had to be in compliance with . . . Section 255.”^{49/}

Arguments that any device that can be used for ACS is covered by Section 716 alone, “regardless of whether the equipment or services can also be used for telecommunications services,”^{50/} and that Section 255 going forward will apply only to equipment in which advanced telecommunications capability is not included, or that a device be subject to both standards unless “the telecommunications and messaging are integrally intertwined or merged,” in which case “the higher of the two standards”^{51/} would apply, are expressly precluded by the Act. The grandfathering provision is clearly meant to address situations in which the equipment or service has aspects or features covered by both Section 716 and Section 255. If the equipment or service has no ACS capability whatsoever, then it clearly would not be covered by Section 716, not because of the grandfathering provision but because it is outside the scope of the Act. The only logical reading of that provision is that it is meant to apply to multipurpose devices or services, and provides the clear answer that Section 255 applies in such situations.

For the same reasons, the Commission must reject calls to regulate interconnected VoIP pursuant to Section 716 if such service, for example, offers a feature such as instant messaging, which was not covered by section 255.^{52/} Congress explicitly directed that interconnected VoIP would remain regulated by Section 255. Thus, the Commission has no authority to hold otherwise.

^{49/} AFB Comments at 4.

^{50/} AFB Comments at 5-6.

^{51/} TRACE Comments at 8.

^{52/} AFB Comments at 6.

II. “ADVANCED COMMUNICATIONS SERVICE” SHOULD BE DEFINED AS LIMITED TO THE PRIMARY PURPOSE OF SPECIFIC PRODUCTS OR SERVICES

The comments reveal a widespread concern that the proposed rules will hinder service providers, manufacturers, and application developers’ ability to bring products and services to market if the scope of covered services are not limited to services and equipment with ACS as their primary purpose and the Commission fails to develop a workable waiver process.

A. The Definition Of “Advanced Communications Service” Should Include Only Services And Equipment Designed With Advanced Communications As Their Primary Purpose.

There is widespread agreement among affected industry members that the final rules will be workable only if the rules’ coverage is limited to products and services with a “primary purpose” of ACS, as determined in the first instance by the provider or manufacturer.^{53/} This approach would allow covered entities the needed certainty about which products and services are covered before they are launched, in a timely enough fashion to incorporate accessibility into the design process where appropriate.

While Consumer Groups argue that some products and services that have primary functions other than ACS are valuable to persons with disabilities – arguing, for example, that

^{53/} See, e.g., CEA Comments at 8-9 (“[I]f a device is not primarily designed or offered for purposes of providing ACS but includes incidental communications functions as a helpful capability, the manufacturer should not be obligated under the CVAA to make the device accessible. This formulation is grounded in the statute and is vital to achieving the goals of increasing accessibility and preserving innovation.”); TIA Comments at 13 (“TIA believes that the Commission should explicitly exclude services and equipment that are designed for purposes other than using ACS from its interpretation of the ACS definitions in Section 716(a.)”); Verizon/Verizon Wireless Comments at 5 (“As a threshold matter, the definitions of all Advanced Communications Services should be limited to services and equipment that are designed with Advanced Communications Services as their primary purpose, as determined by the provider and equipment manufacturer.”).

“gaming is an important facet of the social lives for many people with disabilities”^{54/} – the importance or impact of an activity is not an appropriate basis on which to determine coverage by the Act. Congress explicitly directed the Commission to take the definition of ACS it had created – left deliberately vague so that it could evolve with time and technology – and exempt from coverage under that definition those products and services whose advanced communications attributes are incidental to the primary purpose of the service or device.^{55/}

Moreover, TRACE’s suggestion that any function that is “intended” cannot be classified as incidental and so cannot merit a waiver is illogically narrow.^{56/} It is highly unlikely that a product or service would have “unintended” VoIP capability, given that the covered entity can and does control such functionality. Congress clearly intended for waivers or exclusions from coverage to extend to situations where ACS was not the primary purpose of a service or device, not limit them to situations where “users find ways” of somehow activating functionality that was not meant to be offered.^{57/} Thus, a covered entity’s “intent” to incorporate a particular feature or function should not determine whether such function’s “primary purpose” is ACS. Only those services that are offered primarily as an ACS should be subject to the Commission’s final rules.

^{54/} Consumer Groups Comments at 13.

^{55/} See House Report at 22 (“Section 2 provides liability protection where an entity is acting as a passive conduit of communications made available through the provision of advanced communications services by a third party or where an entity is providing an information location tool through which an end user obtains access to services and information.”).

^{56/} TRACE Comments at 9.

^{57/} TRACE Comments at 13.

B. The Comments Highlight The Infeasibility Of A Waiver-Dependent Approach.

Many commenters support CTIA's position that the Commission's proposal to require entities to request a waiver for each product or service that does not have ACS as a primary purpose is unworkable. Such a process would not only be lengthy, repetitive, and burdensome, but would hinder innovation.^{58/} The product development cycle simply doesn't allow for such a burdensome and unclear process.^{59/} The far better approach is for the Commission to instead exclude categories of devices and services that have "incidental" ACS components from coverage by its final rules.

In the absence of appropriately narrow definitions, the Commission should use blanket waivers to exclude products and services with incidental ACS functions. A blanket waiver

^{58/} See Microsoft Comments at 6 (the FCC should "take practical and proactive steps . . . to build exclusions for products and services with incidental ACS capabilities into its final rules, rather than waiting for numerous, and significantly overlapping, waivers to be filed. This streamlined approach provides marketplace certainty, is efficient, and helps ensure that the Commission's rules do not impose unnecessary burdens on services and devices . . ."); T-Mobile Comments at 8 ("To keep the Commission from inadvertently preventing innovative services and technologies from getting to market, it should be prepared to grant prospective and/or blanket waivers, particularly for service offerings where the ACS component is incidental to the primary purpose for which the service is designed."); TIA Comments at 13-14 ("Individualized waivers create risk for the petitioner, who may not know the outcome in advance of planned production. Additionally, because confidentiality cannot be guaranteed when seeking an individualized waiver, the individualized waiver process would create barriers for manufacturers seeking to develop a new product."); CEA Comments at 18 (requiring individual waivers will "increase costs and administrative burdens and delay introduction of new innovative products to consumers.").

^{59/} See Comments of the Entertainment Software Association, CG Docket No. 10-213, at 10 (April 25, 2011) ("As a practical matter, game equipment, products, and services that incorporate chat or other ancillary communications features typically do so during the design stage, which is one of the earliest stages in the multi-step development process for these products and services. For example, with home game consoles, any significant hardware changes typically must occur no later than 18 months prior to launch if the product is to hit its launch window. Missing the projected launch window can have significant consequences. It could cause a company to forfeit being first to market with an innovative new technology or overshoot a key holiday buying season and lose out on potentially millions of dollars in early sales. As a consequence, any factors that take into account how a particular consumer actually uses an offering cannot be assessed by the manufacturer, publisher, provider, or Commission in time for a waiver to serve its intended purpose."); see also Microsoft Comments at 16 (noting that "businesses that have pending waiver requests but that are facing looming deadlines will have to choose between undertaking costly and unnecessary steps to come into compliance, delaying the product launch, or risking enforcement actions should their waiver requests be denied.").

approach is far more desirable than requiring individualized waivers.^{60/} Such an approach, while it would impose additional burden and expense, could be workable if the Commission commits to act on such requests in a certain time.^{61/} Indeed, the Commission has successfully implemented blanket waiver procedures in other regulatory contexts.^{62/}

^{60/} AT&T Comments at 6 (“[C]lass waivers, when properly limited in scope and duration, could provide strong protection for innovation and quick introduction of products to the market while ensuring that accessibility is addressed in the developmental process.”); Verizon/Verizon Wireless Comments at 9 (“A blanket waiver process . . . would provide the kind of certainty and administrative efficiency from which all involved would benefit.”); TIA Comments at 13 (“[S]hould the Commission instead decide to rely on a waiver process, TIA strongly urges the Commission to use its Section 716(h) authority to grant prospective categorical waivers for these services and equipment, such as products that have a purely incidental VoIP or video conferencing component that might, standing alone, be subject to the CVAA. Granting such categorical waivers would provide manufacturers and industry participants with added certainty that will spur innovation in new devices that may have incidental ACS components, such as TVs with Internet capability or gaming systems with VoIP or video capability that allow gamers to interact with one another.”); VON Coalition Comments at 7 (“Class-based waivers . . . are a judicious use of the Commission’s resources and provide clarity about which products are subject to the regulation. These waivers should be able to be filed confidentially and should not have a time limit. As long as ACS continues to be an ancillary function of the product – and the manufacturer or service provider is not designing or marketing the product based on its ACS features – the waiver should remain.”); T-Mobile Comments at 8; Microsoft Comments at 6.

^{61/} See, e.g., AT&T Comments at 8 (suggesting that the Commission establish “rules requiring a ruling on waiver requests within 90 days of filing.”).

^{62/} See, e.g., *Part 68 Waiver Request of Alameda Engineering, Inc., et al.*, Order, 10 FCC Rcd 12135 (1995) (setting forth a blanket waiver process for stutter dial tone manufacturers that could demonstrate compliance with eight specific performance requirements); *Tandy Corporation, Walker Equipment Company, Ameriphone, Inc., and Ultratec, Inc., Request for Waiver of Volume Control Reset*, 47 C.F.R. § 68.317(f), Memorandum Opinion and Order, 16 FCC Rcd 5253 (2001) (adopting a streamlined process for obtaining waiver of the requirement that telephones with amplification greater than 18 dB (designed for persons with hearing disabilities) must automatically reset to a lower volume when on the hook); *Amateur Service Communications During Government Disaster Drills*, Public Notice, 24 FCC Rcd 12872 (2009) (providing a streamlined process for requesting waiver of FCC rules to permit amateur radio operators to participate in emergency preparedness and disaster drills by transmitting messages on behalf of identified employers); *Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended; Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies*, Order, 25 FCC Rcd 8861, ¶ 8 (2010) (granting a temporary blanket waiver of the prohibition on manufacture or import of 25 kHz-capable equipment in order to ensure that necessary equipment would remain available during the narrowband transition).

The proposals to restrict waivers to an arbitrarily short time period, however,^{63/} would doom the feasibility of such a procedure and should be rejected as inconsistent with industry realities. As described extensively in the comments, accessibility must be considered in the earliest stages of product development.^{64/} Incorporating accessibility into a product after that product has relied on a waiver to enter the market would be a substantial burden and expense. It would not make sense to ask industry to devote time and resources to rebuild an existing product rather than concentrating on how new products and services can take advantage of the latest accessibility solutions. Moreover, the short time periods suggested -- combined with the time the Commission would take to address waiver petitions under the proposed rules -- would result in companies being continually engaged in waiver proceedings. This unnecessary use of time and resources benefits no one.

Similarly, requiring a separate waiver for each device function is unnecessary and overly burdensome.^{65/} Such an approach would potentially result in dozens of waiver requests related to what are essentially the same services within a single product, placing an unrealistic burden on Commission resources and occupying unnecessarily inordinate amounts of time and resources for all involved. Moreover, a manufacturer or provider would be unable to proceed with development and deployment until each waiver request was individually processed and approved, inevitably causing significant delays in product launches. Indeed, many innovative

^{63/} See Consumers Groups Comments at 13 (proposing a two-year waiver period); TRACE Comments at 18 (proposing a one-year waiver period).

^{64/} See, e.g., Motorola Comments at 2; Verizon/Verizon Wireless Comments at 2; VON Coalition Comments at 8.

^{65/} TRACE Comments at 16.

products and services with varying functionalities cannot be separately parsed and identified in a manner that would make separate reviews even possible.^{66/}

The proposal to limit waivers to non-communication functions is without merit.^{67/} Congress specifically considered and intended that the Commission grant waivers to products and services that fell within the definition of ACS but for which application of the rules would not be advisable. Indeed, Congress explicitly stated that it was providing the “Commission with the flexibility to waive the accessibility requirements for any feature or function of a device that is capable of accessing advanced communication services but is, in the judgment of the Commission, designed primarily for purposes other than accessing advanced communications.”^{68/} The Commission cannot narrow the waiver process in a manner that contravenes Congressional intent.

Finally, the Commission’s authority to grant blanket waivers will not exclude the accessibility community from advances in ACS technology.^{69/} When companies can concentrate their time, resources, and creativity on introducing new products and services, rather than engaging in constant administrative battles over whether accessibility is “not achievable,” those innovative new services and products will incorporate the latest in available technology and thinking, including the latest available accessibility features. Accessibility features often benefit a wide variety of subscribers, not just persons with disabilities, and manufacturers and service

^{66/} TRACE’s related suggestion that the Commission refrain from providing class or blanket waivers similarly reflects a lack of understanding of market realities and a disregard for the balance between accessibility and innovation that Congress sought to establish. TRACE Comments at 18-19.

^{67/} TRACE Comments at 17.

^{68/} House Report at 26.

^{69/} TRACE Comments at 19.

providers actively seek to incorporate them because it makes good business sense to do so.^{70/} By relying on the marketplace to the greatest extent possible, all subscribers, including those with disabilities, stand to gain the most benefit.

III. THE PROPOSED RULES MUST ADHERE TO CONGRESS' INTENDED DEFINITION OF "ACHIEVABLE" AND "INDUSTRY FLEXIBILITY"

A. The Achievability Standard Must Adhere To The Act's "Reasonable" Basis.

CTIA agrees that the Act is intended to ensure accessibility to ACS, and that the Commission should avoid interpreting achievability in a manner that leads to accessibility being achieved only in a minority of instances.^{71/} However, proposals that the "unless not achievable" standard should be interpreted to not require accessibility only in "exceptional instance[s]"^{72/} are attempts to rewrite the Act's "achievable" standard beyond the required "reasonable" basis.^{73/} Indeed, that Congress used the term "reasonable" indicates intent that the Commission establish a balanced framework and refrain from requiring accessibility on the basis of the existing accessibility standard extremes of "easily accomplishable" or "significant difficulty or expense."^{74/}

^{70/} See, e.g., AT&T Comments at 2-3 (stating that an "overly broad regulatory obligation could prevent new products from being brought to market, out of concerns regarding compliance costs" and noting that the Commission has previously recognized the "needs of innovators" in "both in the Commission's *de minimis* rule in the HAC context and in the 'Industry flexibility' and 'Commission flexibility' provisions of the CVAA.").

^{71/} Consumer Groups Comments at 16.

^{72/} Consumer Groups Comments at 17.

^{73/} House Report at 24 (stating that the Act affords "manufacturers and service providers as much flexibility as possible, so long as each does everything that is achievable in accordance with the achievability factors" and noting that it "does not intend to require that every feature and function of every device or service be accessible for every person with any disability.").

^{74/} See 47 U.S.C. § 255(a)(2) (adopting the definition of "readily achievable" from 42 U.S.C. 12181(9)) and 47 U.S.C. § 613(e) (defining "undue burden").

Further, the Commission, nor manufacturers or service providers, cannot be expected to repeatedly undertake an achievability review for every device or service that undergoes an update. Proposals to require repeated showings that accessibility is not achievable after lack of achievability has been established – for example, the suggestion that lack of achievable accessibility be re-demonstrated for each new version or model of software or equipment^{75/} – would work against this pragmatic objective. Indeed, the most likely result from weighing providers and manufacturers down with additional waiver requirements for devices or services that have already been found to lack achievable accessibility – when such new versions often include only minor changes or updates – is that providers and manufacturers would refrain from issuing new versions, to the detriment of consumers who would lose the benefit of those innovations. As reflected in the legislative history of the Act, industry should be provided flexibility to develop new, market-driven devices and applications while considering achievable accessibility.^{76/}

B. The Act Clearly Defines Appropriate Obligations When Achieving Accessibility Through Reliance On Or Compatibility With Third Party Solutions.

CTIA agrees with comments that suggest that covered entities may only rely on third party solutions to satisfy their obligations under the Act if such solutions are actually available in the market.^{77/} CTIA also recognizes and agrees that if a covered entity relies on a third party solution, then the covered entity must be able to identify and provide or direct the end user to

^{75/} Consumer Groups Comments at 17.

^{76/} See House Report at 26 (noting the potential that overly burdensome requirements might “slow the pace of technological innovation”).

^{77/} AFB Comments at 4.

that solution or solutions,^{78/} and that any third party solution relied on must be compatible with the covered entity's ACS device or service.^{79/}

It goes beyond the requirements of the Act and reasonable expectations, however, to expect that covered entities will test those third party applications with "other major" third party applications that the customer might want to use, or to otherwise hold manufacturers responsible for such compatibility.^{80/} Legally, the Act imposes no such condition on the use of third party solutions. Practically, there would be no limits to such an obligation because the definition of a "major" third party application could vary widely by subscriber and change frequently, and it would be an inordinate and unreasonable burden to try to keep up with such a requirement.

C. The "Nominal Cost" Of Third Party Solutions Should Be Viewed Over The Life Of The Service Or Device.

Many commenters agree with CTIA that "nominal cost" should be defined by the useful life of the device and in relation to the underlying service purchased by the end user, not as a flat amount of the initial purchase price.^{81/} Those advocating for a very limited view of what constitutes a "nominal" cost^{82/} appear largely focused on having the Commission define "nominal" as very close to, if not equal to, "zero." Such proposals must be rejected as

^{78/} Contrary to some comments, *see, e.g.*, TRACE at 25, it is not always the best solution to provide the end user directly with the solution. First, there is often not one identical solution for all persons; the right solution may depend on what operating system the subscriber is using. Second, in some cases, there may be a choice of solutions, and the consumer may want to pick the solution that best fits his or her needs. In such cases, directing the consumer to the range of accessibility options that would work for him or her may generate the best result for the subscriber.

^{79/} TRACE Comments at 25.

^{80/} *Id.*

^{81/} AT&T Comments at 11 (noting that "the Commission should consider how the cost is presented to and experienced by the consumer at the time of purchasing, rather than only the total cost of the solution."); T-Mobile Comments at 10-11.

^{82/} *See, e.g.*, TRACE Comments at 25; AFB Comments at 3.

contradictory to Congress' direction that covered entities (and their subscribers) need not subsidize the costs of accessibility.^{83/}

In fact, what constitutes a “nominal” cost can be expected to vary substantially depending on the type of product or service and its anticipated lifetime. The final rules should clarify that decisions concerning what is “nominal” are to be determined flexibly and on a case-by-case basis.^{84/}

D. Accessibility Concerns Must Be Balanced Against Privacy, Security And Reasonable Network Management Considerations.

As CTIA explained in its initial comments,^{85/} any accessibility requirements or standards that the Commission adopts must take into account other regulatory goals such as digital rights management limitations, network security, privacy and reasonable network management concerns. All of these regulatory requirements and policy goals must be balanced carefully to ensure a fully functional, consistent and valuable product or service.

Commenters raise various suggestions about how best to perform network management functions and satisfy encryption needs in a manner that prioritizes accessibility.^{86/} First, it is unclear whether the suggested network management or security functions could be technically performed in the manner advocated. Second, the Commission's network management rules are as of yet unclear and what is permissible is being developed on a case-by-case basis. Third, encryption considerations are similarly evolving through independent standards bodies. In any

^{83/} See, e.g., TRACE Comments at 22.

^{84/} Verizon/Verizon Wireless Comments at 12; AT&T Comments at 11

^{85/} CTIA Comments at 29-30.

^{86/} See, e.g., TRACE Comments at 30 (arguing that encryption should be done after injecting accessibility information); Consumer Groups Comments at 22 (arguing that Video Relay Services should be treated similarly to voice bits for network management purposes).

event, this proceeding is not the appropriate forum for resolution of these detailed and complex technical issues. Such issues would be more appropriately considered by the Commission in existing dockets or by established working groups (*e.g.*, the Commission’s Communications Security, Reliability, and Interoperability Council).

IV. THE COMMISSION’S ENFORCEMENT REGIME SHOULD MEET BASIC REQUIREMENTS OF DUE PROCESS AND ADHERE TO ESTABLISHED INFORMAL COMPLAINT PROCESSES

A. Commenters Agree That The Proposed Informal Complaint Process Is Unnecessarily Burdensome.

All consumers, including persons with disabilities, are best served if the FCC encourages the early and private resolution of complaints at every opportunity. The informal complaint process should be designed to serve that purpose – to provide an easy means for consumers to get their problems or concerns resolved. Yet the comments reveal widespread agreement that the proposed informal complaint system would have just the opposite effect.^{87/} The proposed response procedures are unreasonable, overly burdensome, and would actually slow down any potential resolution of complaints.^{88/} Further, Section 717 of the Act modified the enforcement process in terms of the Commission’s procedural requirements and does not direct any specific revisions to the existing requirements for defendants. The Commission’s final rules should be modified to address these concerns and to be consistent with the Act’s intent.

^{87/} See, *e.g.*, T-Mobile Comments at 15 (“The proposed content requirements for answers are overbroad and appear to be designed to subject a defendant to a general investigation of its accessibility compliance, rather than to successfully resolve an informal complaint.”); AT&T Comments at 14-15 (“As currently crafted, the Commission’s proposed “informal” complaint process is exceedingly complex and formal, and unnecessarily adjudicatory in nature. The Commission should simplify this process to make it more accommodating to consumers and less burdensome on service providers, manufacturers, and the Commission itself. A more streamlined process is likely to yield better results for consumers more quickly”); *see also* TechAmerica Comments at 10; CEA Comments at 43-47; TIA Comments at 25-29.

^{88/} CTIA Comments at 35-40; TIA Comments at 27-28; AT&T Comments at 15-17.

Suggestions that requiring pre-filing notices of complaints would be too burdensome for complainants seem overly cautious.^{89/} Preparing and sending notice of a perceived violation is a very minor step – requiring little to no cost, and no substantial time delay – but serves an important purpose, often resulting in a potential complainant obtaining a quick resolution of a complaint without the need to undertake a formal Commission filing.^{90/} Moreover, the consumer complaint filing requirements are virtually identical to the requirements provided in Section 255, none of which have been deemed to be overly burdensome to potential complainants.

Although some suggest the Commission should award damages and attorneys’ fees and costs to complainants,^{91/} the Act specifically limits the Commission’s powers in this regard. It allows the Commission to assess forfeiture penalties for failure to abide by certain provisions of the Act, but makes no provision for any awards to complainants.^{92/} The Commission must reject such suggestions that exceed its authority.

B. The Commission Must Adhere To The Act’s Specific Recordkeeping Provisions.

The Commission must reject AFB’s proposal to extend the Act’s recordkeeping obligations. AFB urges the Commission to adopt rules that will ensure the “availability of documentation” that will assist the “Commission in any analysis of the four-part “not

^{89/} TRACE Comments at 39.

^{90/} CTIA Comments at 32; Verizon/Verizon Wireless Comments at 14; AT&T Comments at 13.

^{91/} TRACE Comments at 4.

^{92/} 47 U.S.C. § 503(b)(2)(F) (providing forfeiture requirements for “any manufacturer or service provider subject to the requirements of section 255, 716, or 718, and is determined by the Commission to have violated any such requirement”). Indeed, by specifically prohibiting private rights of action, Congress indicated its intent not to allow private citizens the right to recover damages for violations of the Act.

achievable” test,” including, a company’s “decision-making record[s],”^{93/} but imposing such an explicit obligation is flatly outside the bounds of the Act. The Act explicitly sets forth the recordkeeping obligations of covered providers and manufacturers, and limits them to three categories of documents: “(i) Information about the manufacturer’s or provider’s efforts to consult with individuals with disabilities; (ii) Descriptions of the accessibility features of [the covered entity’s] products and services; [and] (iii) Information about the compatibility of such products and services with peripheral devices or specialized customer premise equipment commonly used by individuals with disabilities to achieve access.”^{94/} The Commission does not have the authority to expand these categories, and as such, must reject AFB’s suggestion.

^{93/} AFB Comments at 4.

^{94/} 47 U.S.C. § 618(a)(5).

CONCLUSION

The Commission should revise its proposed rules as discussed herein.

Respectfully submitted,

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